(4)

No. 89-1717

In The
Supreme Court of the United States
October Term, 1990

THE PEOPLE OF THE STATE OF FLORIDA,

Petitioner,

--against--

TERRANCE BOSTICK,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN QUALIFIED SUPPORT OF AFFIRMANCE OF THE DECISION BELOW.

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MOTION OF AMICUS
CURIAE TO FILE BRIEF
PURSUANT TO RULE 37.4 OF THE
U.S. SUPREME COURT RULES

Americans for Effective Law Enforcement, Inc., moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae.* The *amicus curiae* is described as follows:

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE sponsors law-related seminars for police executives, training supervisors, internal complaint investigators, and their legal counsel. **AELE** also publishes monthly law digests relating to police civil liability, jail and prison legal issues and private security law.

AELE has previously appeared as *amicus curiae* over eighty-five times in the Supreme Court of the United States and over thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Missouri, and Ohio.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of law enforcement agencies at the state and local levels. Our constituency includes: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility of conducting street stops for investigations within the bounds of the law, and (2) police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in

connection with such matters and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our constituency--including active law enforcement administrators and counsel --we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* **AELE** is a national organization, and its perspective is broad. This brief concentrates on policy issues, including the values served by the adoption of reasonable rules for guiding police conduct in the law of stops for investigation. Although Petitioner and Respondent are clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the opinion of the court below and the positions taken by respective counsel for the parties in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues involving the administration of law enforcement that are not otherwise raised by either party in this case.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties pursuant to Rule 37 of the U.S. Supreme Court Rules. This Motion is necessary because such consents have not been received as of the time of printing of the Brief. Should they be received thereafter, they will be filed with the Clerk of this Court with a request that this motion be withdrawn.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF AMICUS

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

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ARGUMENT

I.

POLICE BOARDING OF A PASSENGER BUS AT A STOP-OVER WITHOUT PARTICULARIZED SUSPICION, AND ASKING PASSENGERS FOR PERMISSION TO SEARCH LUGGAGE, CONSTITUTED AN UNREASONABLE "SEIZURE" WITHIN THE MEANING OF THE FOURTH AMENDMENT. THE PASSENGER'S ENSUING CONSENT TO A SEARCH OF LUGGAGE WAS NOT FREE FROM THE TAINT OF THE ILLEGAL DETENTION, AND THE POLICE PROCEDURE, ALTHOUGH EFFECTIVE IN THIS

CASE, IS FAR REMOVED FROM WELL-ACCEPTED LAW ENFORCEMENT PRACTICES, AND IT CURRENTLY EXCEEDS WIDELY RECOGNIZED JUDICIAL PRECEDENT.

Amicus will not discuss at length the case law analysis of the parties in this case. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators and concerned members of Society to ensure that law enforcement officers have sufficient guidance in the area of Fourth Amendment jurisprudence.

In this case the Supreme Court of Florida, *Bostick v. State*, 554 So.2d 1153 (1989), ruled that an impermissible seizure resulted when sheriff's officers, pursuant to departmental policy, launched a drug search of passengers on buses traveling from Miami, Florida, to Atlanta, Georgia. The search, during a scheduled stop, was accompanied by the questioning of passengers about drugs without particularized or reasonable suspicion for doing so. In many instances the police obtained the "consent" of passengers to search their luggage.

The respondent, hereinafter referred to as "defendant," was asked to display his ticket and identification when he was accosted while sitting in the bus. He did so and his papers were immediately returned to him when they appeared to be in order. He was then asked to consent to a search of his luggage which he did, and cocaine was found therein.

The court ruled that the passenger had been "seized" without reasonable suspicion. It found that when he was first approached by the officers, while seated in the rear of the bus with the officers blocking the aisle, whatever freedom to leave was only ephemeral at best under the rule of *United States v. Mendenhall*, 446 U.S. 544 (1980). His "consent" was ruled tainted by the illegal detention.

In *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968), this Court ruled that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." This rule was further clarified in *United States v. Mendenhall, supra*, by the concurring Justices who stated that only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave would such person be seized for Fourth Amendment purposes.

Amicus finds no fault with the ruling of the court below that defendant was seized within the meaning of *Mendenhall*, and agree that this was no mere consensual encounter within the purview of *Florida v. Royer*, 460 U.S. 227 (1983). We likewise can find no facts in the record below that would constitute reasonable suspicion for the seizure within the purview of *Terry v. Ohio, supra*. As noted in the opinion below, "the state concedes that it lacked any basis for suspecting illegal activity whatsoever." 554 So.2d 1158 (Fla. 1989). We likewise have no quarrel with the court's conclusion that the defendant's subsequent "consent" was tainted, there being no apparent break in the chain of illegality sufficient to dissipate the taint of the illegal seizure.

Unlike the court below, however, *amicus* does not believe that "our inquiry is at an end." 554 So.2d 1158.

Amicus, with more than sixteen years of experience in police training and education, view the confrontation and search procedure used here as highly unusual, if not unique. Despite the fact that the procedure employed was successful in this case, few law enforcement agencies would seriously consider adopting a policy of planned intrusions onto

intercity buses and standardless solicitations of consent to search a person's baggage and personal effects.

We submit that if such techniques--which are undoubtedly successful in ferreting out some unspecified amount of drugs and thus removing such material from the street--are to be countenanced at all by this Court, there should be an objective, though minimal, finding of criminal activity before a mass detention of interstate or intrastate travelers is permitted.

While the suspicionless drug testing of public safety employees has been allowed by this Court, *Skinner v. Railway Labor Executives Assn.*, ___ U.S. ___, 109 S.Ct. 1402 (1989); *National Treasury Employees' Union v. von Raab*, ___ U.S. ___, 109 S.Ct. 1402 (1989), such was done on the basis of a compelling need to protect public safety, with no practical alternative to the governmental means employed. Much the same moved this Court to recently sanction the use of DUI roadblocks in *Michigan v. Sitz*, ___ U.S. ___, 110 S.Ct. 2481 (1990).

The rationale of these cases has not been extended to citizens at large merely because they are travelers, without any relationship to safety on board a common carrier; moreover, any such extension would be constitutionally invalid. Setting aside equal protection issues, it is difficult to imagine a scenario of police activities, as in the present case, upon a planeload of business class air passengers arriving at a busy air terminal after an interstate flight.

II.

WHENEVER A MASS DETENTION AND QUESTIONING OF TRAVELERS IS CONTEMPLATED, THERE MUST BE A REQUIREMENT OF AN OBJECTIVE (THOUGH MINIMAL) INDICIA OF CRIMINAL ACTIVITY. WE DO URGE THE COURT, HOWEVER, TO LEAVE UNDISTURBED ITS PRIOR HOLDINGS AFFIRMING THE USAGE OF (a) LEGITIMATE DRUG COURIER PROFILES; (b) CITIZEN DRUG DEALER TIPS, AND (c) OTHER LEGITIMATE DETENTIONS FOR INVESTIGATION AND QUESTIONING.

Whenever a mass detention and questioning of travelers is contemplated, there must be a requirement of an objective (though minimal) indicia of criminal activity. We do urge the Court, however, to leave undisturbed its prior holdings affirming the usage of (a) legitimate drug courier profiles, (b) citizen drug dealer tips, and (c) other legitimate detentions for investigation and questioning.

Because of the major epidemic of drug trafficking, with all its tragic consequences, law enforcement authorities may understandably approach the edges of the Fourth Amendment, and seek legal expansion of the situations where drug evidence may be seized. However, it is equally important that any extension of the Fourth Amendment must proceed in ways that protect our nation's citizens against the arbitrary and often abusive techniques employed in totalitarian societies.

Among police procedures that should be legally approved is the use of drug-sniffing dogs at public bus stations and truck stops where vehicles are temporarily parked. Such dog sniffs do not constitute a search under the Fourth Amendment, *United States v. Place*, 462 U.S. 696 (1983). This technique could provide a reasonable basis for the removal and detention of a specific suitcase or box until consent or a search warrant is obtained for opening it. We are concerned, however, that if the practices employed by the law enforcement officers in the present case are condoned, similar practices would eventually extend to schoolrooms, places of entertainment, offices and other workplaces.

Any extension of the strictures of the Fourth Amendment to permit the confrontation and consensual search of travelers outside of airports and border entry stations must be accompanied by a threshold requirement that law enforcement officers possess a minimal, but nevertheless articulable indicia of criminal conduct.

Regardless of whatever action the Court may take with respect to the ruling below, we ask that the Court *not* disturb its prior rulings that have sanctioned a wide-range of essential law enforcement activity in related areas. Specifically, we urge this Court to make clear that its ruling would not call into question the use by law enforcement agencies of drug courier profiles for investigative stops, *United States v. Sokolow*, __ U.S. __, 109 S.Ct. 1581 (1989), investigative stops based upon corroborated anonymous citizen reports of crime, *Alabama v. White*, ___ U.S. ___, 110 S.Ct. 2412 (1990), and the various aspects of investigative stops related to the safety of law enforcement officers, *Adams v. Williams*, 407 U.S. 143 (1972), and *Michigan v. Long*, 463 U.S. 1032 (1983). These activities are grounded upon the objective standard of articulable suspicion flowing from *Terry v. Ohio, supra*, and are sufficiently safeguarded by appropriate restraints upon officer discretion, ensuring their reasonableness as well as necessity for effective law enforcement. The instant case, we submit, is far removed from the facts and rationales of those cases, and should be disposed of in a manner limiting this Court's ruling to the facts of this case.

CONCLUSION

Amicus submit that the law enforcement activity involved in this case is not a prevalent practice in law enforcement agencies. If this Court affirms the decision of the court below, we respectfully urge that it not adversely affect the Court's earlier rulings in the above cited cases.

Respectfully submitted,

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